

NOTE: This determination contains an order prohibiting publication of certain information at [1] and [111] – [116]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 798
3304260

BETWEEN XDC
Applicant
AND ALLIED INVESTMENTS LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: XDC in person
Richard Roil and Grace Adeyinka-Fayomi for the
Respondent

Investigation Meeting: 29 and 30 April 2025 in Wellington

Submissions: 12 June and 28 September 2025 from the Applicant
27 June and 1 October 2025 from the Respondent

Determination: 9 December 2025

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] There are non-publication orders prohibiting the publication of names and identifying details of the applicant (XDC) and an employee who was referred to by both parties but did not give evidence at the investigation meeting (TPG).

Employment Relationship Problem

[2] XDC says he resigned from Allied Investments Limited (which trades as Allied Security) because the workplace was unsafe for him and Allied took no steps or

inadequate steps to remedy the concerns he raised. XDC says he was disadvantaged by the way his manager treated him and forced to resign to seek relief from bullying.

[3] Allied says its actions were justified because although there were robust exchanges between XDC and his manager, this did not reach the threshold for bullying. It investigated XDC's complaint he was bullied to reach the conclusions it did and was satisfied the workplace was safe. It also reviewed the disciplinary process and finding in relation to the allegation XDC had failed to follow a lawful instruction and concluded the instruction was lawful and reasonable and the employment investigation into XDC had followed a fair process. The issues each party raised about the other overlapped but Allied says all actions it took were reasonable steps for an employer to take in the circumstances.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from XDC and his wife. On behalf of Allied written statements were lodged from Hilary Sinclair-Hyde, HR practitioner, Jared McGregor and Alan Timms who conducted the health and safety review and reviewed the initial employment investigation, Jason Lynch and Grant Howard who completed the employment investigation and Travis Austin who was XDC's manager. All witnesses answered questions under oath or affirmation.

[5] At the conclusion of the investigation meeting the parties attended further mediation but were unsuccessful in resolving their differences. Written submissions were lodged from both parties.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues for investigation and determination were:

- (a) What were the reasons for XDC's resignation?
- (b) Was XDC's resignation caused by a breach of duty by Allied Security?

- (c) If not constructively dismissed, was XDC nevertheless unjustifiably disadvantaged by how he was treated during his employment?
- (d) Should any remedies be awarded?
- (e) If any remedies are awarded, should they be reduced for blameworthy conduct by XDC that contributed to the situation giving rise to his grievance?

XDC was employed by Allied Security

[8] XDC was employed as an operations manager at Allied Security from 15 November 2023 until his resignation on 12 March 2024 giving a months notice. He reported to Mr Austin who was a regional manager.

[9] It is necessary to refer to another Allied employee, who did not give evidence, but is referred to in this determination as TPG. Aspects of TPG's employment became the focus of a series of disagreements between XDC and Mr Austin. TPG reported directly to XDC and it transpired that approximately five months before XDC's employment, TPG and a store manager were involved in an incident with members of XDC's family. Allied was also notified about the incident at the at the time but not about XDC's involvement. This is referred to further below.

The TPG's performance is managed by XDC

[10] In December 2023, shortly after commencing employment, XDC took steps to address performance issues with TPG by issuing two letters of expectation. Mr Austin was unhappy the letters of expectation were issued without discussion and his sign off, and he was unaware XDC had prior knowledge of TPG until after the disagreements about TPG's performance and the response to TPG's resignation escalated. That ultimately led to Mr Austin giving XDC an instruction that XDC refused to follow.

[11] XDC says he noticed TPG's conduct at work almost immediately and set about correcting it. XDC said there were serious performance issues to do with TPG's inability or refusal to update his personal mobile phone so he could use Deputy. Deputy is the name of the system Allied Security uses for rostering and time recording. It is mandatory for employees to use Deputy. XDC said prior to him starting TPG had been allowed to not show up for shifts without notification or call off at the last minute.

[12] XDC says he provided temporary support to TPG to allow him time to correct his behaviour including time to purchase a new phone compatible with Deputy. XDC also clocked TPG in and out on Deputy sent the roster to him by text on condition TPG sort the issues out. These issues were not fixed and on 23 December 2023, XDC issued the first letter of expectation to TPG about being late and not having a phone compatible with Deputy. With no improvement XDC issued a second letter of expectation five days later requiring TPG to replace his phone by 14 January so the issues with accessing Deputy could be resolved. The letter also recorded that failure to comply with the direction to replace his phone would result in disciplinary action.

[13] XDC accepted the concerns with TPG were performance in nature rather than disciplinary but maintained they were very serious concerns, hence the letters. Mr Austin says after XDC presented this situation to him he advised XDC he had not followed correct procedure regarding letters of concern which had been recently explained to him.

[14] I note at this point the letters of expectation were written in a style that was disciplinary in nature and tone and Allied was justified in having concerns about this approach addressing performance concerns.

TPG resigns and then rescinds his resignation

[15] TPG resigned immediately after the second letter of expectation.

[16] On 29 December 2023, TPG came to drop off his uniform and asked to speak with Mr Austin. TPG wanted to express concerns about XDC's communications with him leading up to his resignation. Mr Austin looked into TPG's shifts and the correspondence and immediately noted several things. Firstly, the tone of the letters was disciplinary in nature but TPG was not under disciplinary investigation. Secondly, XDC had accepted TPG's resignation immediately with no "cooling off" period. Thirdly, XDC informed TPG at the same time they did not need to work out their notice and replaced all TPG's shifts within hours of accepting his resignation.

[17] Mr Austin was concerned enough to offer TPG a cooling down period to reconsider his resignation. TPG accepted that option and withdrew his resignation but reiterated his concerns about how he was treated by XDC. Mr Austin told TPG he would be monitoring the situation going forward.

XDC is informed that TPG's resignation is withdrawn

[18] On 15 January 2024, Mr Austin told XDC he had agreed to rescind TPG's resignation and decided to place him at a new location because his shifts had already been backfilled by other staff. XDC did not agree with either the decision to rescind TPG's resignation or the new placement for TPG. In his view TPG was not a good fit at the new location, because of ongoing issues finding suitable staff for that particular client. In XDC's opinion this was especially so given TPG's "contentious behaviour" with regard to using Deputy.

XDC refuses to cover TPG's shift

[19] On 29 January 2024, at 4.38pm, Mr Austin sent an email to the team advising the shift TPG was doing the next day would need cover from 2.00pm and XDC would need to find a replacement for part of this shift. He also asked XDC to ramp up recruitment for guards to be placed at a particular location. That was the start of an email conversation between Mr Austin and XDC which escalated and continued until after midnight.

[20] It resulted in Mr Austin giving XDC three instructions with increasing specificity that XDC was to cover TPG's shift the next day. XDC refused on each occasion pointing out various reasons. His workload was initially raised, he had a busy schedule the next day and recruitment was an issue. XDC then adopted the position he was not compelled to cover TPG's shift because this situation had come about because of Mr Austin's decision making about TPG. XDC recorded his unhappiness about TPG rescinding their resignation in the face of TPG's "ineptitude" and secondly not allowing XDC to arrange the roster as he saw fit.

[21] At 11.05pm Mr Austin emailed a very direct third and final instruction to XDC to cover the shift the next day:

It is not up for debate [XDC]. Follow instructions that I give you. At 2pm you will supply cover for TPG tomorrow at [the location].

[22] At 11.08pm XDC quickly replied "No, sir I will not". Mr Austin replied this would need to be handled with an official HR process for failing to follow lawful instructions. They continued emailing until 12.30 am with XDC suggesting he was not supported adequately and stating it was unfair to escalate this matter to an investigation for insubordination. Mr Austin pointed out they had a complaint TPG felt pressured

into resigning by XDC. He also noted XDC withheld a potential conflict of interest with TPG which he (Mr Austin) had put to one side but he was of the opinion it was one of the reasons XDC was failing to follow Mr Austin's instructions to find cover for part of TPG's shift the next day.

[23] XDC sent the last email and raised bullying:

We are getting to a bad place, I am now being harassed by your threatening HR saying he was in a bad place now and was being harassed by Mr Austin threatening HR as an attempt to de-leverage me, and squash my ability to fairly and reasonably disagree as to what my responsibility is with this particular situation. A situation, you did not give me full ability to resolve, having cut me off at several instances in attempting to pursue a meaningful remedy. This is damaging, and potentially position ending for me as you refuse to set another option forward, and support me as your direct report.

It is a form of harassment by coercion (bullying), and should you pursue HR against my behalf, I may counter with a personal grievance, as you are not giving a reasonable and rational way forward to mitigate the situation, one which would allow you and I to move forward professionally. Conversely, I absolutely refuse to be responsible for a situation you created through your reactionism. As this has now become toxic, Travis, I will not be going to work tomorrow in light of it.

The rest of the email set out what XDC required in terms of cover for XDC's duties given he would not be coming to work the next day.

[24] Several things happened on 30 January 2024. Mr Austin telephoned Grant Howard, Key Account Manager, about these emails. Mr Howard made a separate decision to start an investigation into concerns about XDC not following Mr Austin's instruction. Mr Austin also received a written complaint from TPG alleging TPG was bullied by XDC. Mr Austin said he scanned TPG's complaint and emailed it to Mr Howard for him to investigate. Ultimately TPG's complaint was not investigated because XDC resigned.

An investigation starts in relation to XDC failing to follow a lawful instruction

[25] XDC received an email from Mr Howard inviting him to an employment investigation meeting on 2 February to discuss the concerns about his failure to follow an instruction issued to him by his manager and an additional concern he was absent from work on 30 January without authorisation. A formal letter setting out the allegations along with the emails between XDC and Mr Austin on 29 January 2024 were attached together with the Code of Conduct.

[26] XDC responded to the allegations straight away, setting out his position and raised a personal grievance claim. By way of summary XDC's response to the first allegation was:

- The instruction was not reasonable and was retaliation and designed for Mr Austin to gain an unfair advantage over XDC.
- XDC had already warned Mr Austin what TPG was like.
- Despite that Mr Austin chose to allow him to rescind his resignation.
- Mr Austin also chose to place him at an unsuitable location.
- XDC was in the middle of recruiting for that client and should have been allowed to continue and not have TPG placed with that client.
- XDC's workload was such that he did not have time to provide the cover himself.
- XDC was not given enough time to be able to find cover for TPG (22 hours).
- XDC told Mr Austin about the incident involving TPG and his family to support his rationale for why TPG was not suitable.
- Knowing all of that Mr Austin's instruction amounted to bullying.

[27] XDC's response to the second allegation can be summarised as follows:

- Mr Austin's emails constituted bullying – both the tone and the timing.
- The instruction was a form of bullying because it was not reasonable.
- There was no acknowledgement of XDC's workload and no attempt to offer a compromise to de-escalate the situation.
- Mr Austin was simply trying to assert dominance over XDC.
- XDC's email responses were borne out of feeling stressed and anxiety.
- Mentioning a failure to disclose a conflict of interest and elevating to an HR process and investigation were veiled threats designed to make XDC fearful.
- It was not unauthorised leave because although XDC conveyed he was not coming into the office, he still worked from home.
- He accepted he did not clock into Deputy.

[28] An investigation meeting was held on 2 February. Mr Grant's notes indicate XDC regarded 22 hours as not enough time to arrange cover and XDC did not know the reason TPG's shift needed covering. In relation to not coming to work the next day

XDC reiterated he did not feel safe which is why he sent a list of tasks that needed reallocating because he could not complete his duties due to safety concerns. XDC felt threatened by Mr Austin and when it was put to him permission is required to work from home his response was that he was entitled to work from home by law if he felt unsafe.

[29] XDC indicated he had been recording the meeting. Mr Howard gave evidence about how XDC presented at the meeting and recorded a file note about that. XDC was asked not to cut Mr Howard and Mr Lynch off and let them finish their sentences. Mr Howard said when asked probing questions about why XDC did not want to cover TPG's shift, the dialogue became unproductive, and they had to ask XDC to stop raising his voice. XDC repeated he felt unsafe and said the others were not letting him finish. An alternative work location was settled on for XDC until this matter could be resolved.

[30] Two things happened on 5 February. Mr Howard sent XDC a letter stating that after their meeting on 2 February they now wished to hold a disciplinary meeting with XDC and invited him to attend a further meeting on 7 February. The letter recorded it had been decided XDC had breached the Code of Conduct by failing to obey a lawful and reasonable instruction and taken unauthorised leave from the workplace. Both allegations were recorded as being considered to be serious misconduct and if proven one of the outcomes could be disciplinary action up to and including termination of employment. XDC was invited to provide any feedback he wished to provide to Mr Howard to take into consideration prior to the disciplinary meeting.

[31] XDC's explanations for refusing to provide cover for TPG were noted in the letter as being:

- the request was at short notice.
- Mr Austin did not ask to meet with XDC to discuss the request or offer assistance with XDC's workload.
- XDC had duties he could not reschedule.

[32] XDC's explanations were not accepted and the rationale for this conclusion was set out:

- There was sufficient time to find cover;

- Mr Austin's first email stated that they would discuss in the morning so he did offer to discuss it with XDC;
- Mr Austin did offer assistance with workload by having another operations manager conduct the interview XDC had scheduled;
- XDC did hand off all of his duties the next day when he decided not to come into work the next day so they were able to be rescheduled;
- There was no evidence Mr Austin was creating an unsafe environment in the office and their offices were separate;
- XDC refused three times to provide cover for TPG before Mr Austin raised the need for HR assistance to resolve the dispute between them;
- Matters did not escalate until after XDC refused to provide cover as requested of him by Mr Austin.

[33] Also on or about 5 February, Mr Austin had cause to speak to XDC again. TPG had not shown up for a shift and this had the potential to impact on the relationship with the client. After looking into what happened, knowing TPG was having technical issues with his phone, Mr Austin could see TPG was not aware changes had been made to his roster. Mr Austin asked XDC to be more supportive of TPG and to continue to assist him with accessing Deputy and logging in and out of his shifts.

[34] At this point Mr Austin was sufficiently concerned about how TPG was being treated by XDC to advise XDC this could be seen as disadvantaging TPG by being unsupportive given his phone issues were known to the employer. They met and XDC disagreed. Mr Austin asked XDC to leave his office and return to his desk because the meeting became unproductive. XDC did not accept he should assist TPG with his roster because of the existing phone issues which he had tried to manage.

[35] There were some text messages between them about whose responsibility it was to follow up with TPG about his availability and then Mr Austin became aware XDC had removed TPG from all his Monday to Friday shifts without notice or consultation. Mr Austin explained this was a significant problem for Allied Security because TPG was on a full-time contract with a minimum of 36 hours guaranteed work. As a result of XDC's actions TPG would only have eight hours work that week.

[36] Also on 5 February XDC sent a detailed written response to the letter recording the finding he had breached the Code of Conduct and failed to follow a reasonable instruction. XDC's written response dated 5 February largely restated his earlier written feedback but was recorded in red under each section of the letter. It was clear he did not accept any of the findings. He also said he did not feel safe in the office

because of the way things had escalated with Mr Austin and concluded the findings were without merit or cause, Mr Austin's directive was unlawful because policy does not supersede law and stated that XDC's rights as an employee had been violated.

[37] On 7 February, Mr Howard and Mr Lynch attended the final meeting with XDC over AVL. After explaining to XDC the meeting was for him to provide feedback on their findings, that he had breached a lawful instruction and taken unauthorised leave, XDC told the meeting he did not have anything further to say and referred them to his written response. Mr Howard said they would consider his responses and deliver their decision by close of business the next day.

XDC raises a personal grievance claim about Mr Austin

[38] After the meeting but before Mr Howard delivered the decision, XDC emailed a personal grievance claim to Chris McDowall, General Manager, Operations, raising concerns about how he was being treated by Mr Austin:

I am scheduled to potentially be terminated from my position on 7 February 2024 at around 3pm, based on the 'findings' of the 'investigation' conducted on Friday second of February 2024. Grant Howard had stated you are the one with which to submit my personal grievance with in regards Travis Austin, Regional Manager.

The grounds of the grievance against Mr Austin are due actions he has against my behalf [sic]

- deliberately misdirected facts, circumstances and situations to attain an unearned unlawful advantage to suit his own goal so as to marginalize and/or eliminate me from my position without proper process
- attempted to enforce my compliance to an unlawful instruction, as to not consider reasonable alternative considering load management, a contract breach under the 2000 Employment Act
- utilising false charges of wrongdoing/policy regulations manipulation to garner an unearned advantage, creating a hostile environment not safe to fairly or reasonably work under, in an attempt to compromise my position.
- Utilisation of direct threats as to undermine my position, deliberately causing emotional distress, this temperament, and anxiety violating my rights under 2015 Health & Safety act regarding workspaces.

[39] The email made it clear the grievance was also about the process followed when investigating the concerns about XDC's conduct saying it was neither transparent nor neutral and was more of an interrogation:

... as it was approached with an outward intent to establish a narrative that allowed the Company to leverage over the employee (myself) as a means for plausible deniability and circumvention of liability.

[40] XDC restated his position on the events with TRG including:

- TPG's failure to use Deputy was blameworthy and serious and his failure to show up for a rostered shift on 3 February was predictable.
- Mr Austin contributed by allowing TPG to rescind their resignation.
- TPG was not a good fit for that assignment not only because of excessive attendance issues but also the incident TPG was involved in with XDC's family members (prior to employment at Allied Security).
- Mr Austin was accountable for his decisions about TPG so the missed shift on 3 February was Mr Austin's fault.
- XDC was "disempowered" to provide a solution to the staffing situation at the jewellers by Mr Austin's actions when he decided TPG should be moved into those shifts.

[41] XDC had a number of concerns about the detail of what Mr Austin was trying to achieve and the basis of his concern was that his ability to roster his staff was being taken away or controlled and he viewed Mr Austin's actions as underhanded and designed to pressure, de-leverage and bully XDC.

[42] Mr McDowall, responded to that email on 7 February 2024, advising he would look into XDC's complaint about Mr Austin but noted a lot of what XDC outlined was part of the current investigation into XDC which had not yet concluded. He suggested they let the current HR process run its course and pick up the formal complaint about Mr Austin after that. Mr McDowell also indicated he was in Wellington the following week and he could discuss this in person with XDC. There was no indication XDC objected to this proposed way of advancing the concerns raised.

XDC is issued with a written warning

[43] On 8 February 2024, Mr Howard's letter to XDC conveyed the outcome of the disciplinary meeting. Both allegations were separately found to be serious misconduct and a written warning effective for 12 months was issued.

XDC changes TPG's shifts a second time

[44] On 12 February 2024, Mr Austin spoke to XDC about changing TPG's shifts without notice for a second time and instructed him to either place TPG back on the original shifts or provide him with his minimum hours of work. XDC refused. It was

his view Mr Austin should never have allowed TPG to withdraw his resignation. Mr Austin had created the problem and XDC should not have to be involved in fixing it.

[45] On 13 February 2024, after further disagreements about TPG's placements, Mr Austin asked another staff member to change TPG's roster. XDC removed TPG from those shifts again. Mr Austin asked XDC to come to his office to discuss this further. Mr Austin's written evidence was this was when XDC told him about the conflict of interest with TPG but other evidence indicates he knew about this earlier. In any event Mr Austin asked for further details and XDC explained there had been an altercation between TPG and some of XDC's family members. Mr Austin voiced his concern about whether this should have been disclosed as a conflict of interest at the beginning of XDC's employment but XDC assured him it was not a problem and he had not treated TPG differently from anyone else.

[46] Mr Austin had formed the view by this stage that XDC was treating TPG differently and said he did not believe XDC when he denied this. He removed all contact between TPG and XDC. XDC was not happy with this because he believed he had done nothing wrong but agreed that moving forward it was probably for the best.

XDC still feels unsafe and wants the written warning rescinded

[47] On 17 February 2024, XDC emailed Mr McDowell again. They had not been able to meet when Mr McDowell was in Wellington. XDC wished to advance his complaint about Mr Austin and have the written warning rescinded from his employment record. XDC said he did not feel safe professionally. He felt targeted and marginalised by Mr Austin and had concerns about the written warning and the investigation for failing to follow a lawful instruction.

[48] XDC disagreed with the decision to rescind TPG's resignation. He considered Mr Austin's actions in rostering and changing TPG's roster to be deleveraging XDC and undermining his ability to manage the rostering in the operations manager role. He also considered that commencing a disciplinary investigation into his conduct to be retaliatory conduct by Mr Austin designed to assert dominance over XDC and further delevage his position.

[49] XDC says the written warning was defective because it "demonstrates upper management closing ranks against [XDC] to circumvent liability away from the

company even though the liability was committed by a member of its own management group.”

[50] Mr McDowall responded to that email on 19 February, advising Alan Timms, National Sales Manager, and Jared McGregor, Health and Safety and Compliance Manager, had been tasked to investigate XDC’s complaints about Mr Austin as follows:

- (a) review the HR process, and outcomes, to ensure fairness to all parties, and provide any recommendations if and where required.
- (b) investigate [XDC] allegations of bullying against Mr Austin, inclusive of a wider review of the Wellington office.

[51] A preliminary report was to be provided in 10 days. The terms of reference were provided to XDC and XDC was offered confidential counselling to support him. There was a short delay while Mr Timms was on leave but Mr Timms and Mr McGregor carried out a review of the employment investigation and investigated the bullying allegation. The report recorded XDC’s concerns about Mr Austin as follows:

- (a) Deliberately misdirected facts, circumstances, and situation to attain an unearned and unlawful advantage to suit his own goal as to marginalise and /or eliminate XDC from his position without proper process;
- (b) Attempted to enforce compliance to an unlawful instruction, as to not consider reasonable alternative considering load management, a contract breach under the 2000 Employment Act;
- (c) Utilising false charges of wrongdoing/policy regulations as manipulation to garner an unearned advantage, creating a hostile environment not safe to fairly or reasonably work under, in an attempt to compromise my position;
- (d) Utilisation of direct threats as to undermine my position, deliberately causing emotional distress, distemperament, and anxiety violating my rights under 2015 Health and Safety Act regarding workplaces.

XDC makes a further complaint about Mr Austin

[52] On 9 March 2024, XDC emailed Mr Timms and Mr McGregor a further email exchange between XDC and Mr Austin and said these were new and ongoing instances of bullying and harassment of XDC.

[53] Mr Austin and XDC continued to have difficulties in the workplace. Mr Austin said on 23 February XDC had again refused to cover a shift when a guard pulled out and instead left the shift open. Mr Austin says he asked XDC if he needed assistance with recruitment which XDC declined. There was another issue with a guard not clocking onto a shift and XDC refused to go to the store in accordance with Mr Austin's instruction. XDC was able to explain his rationale for his actions but did not deny those things happened. There were further emails from XDC.

The outcome of the review and bullying investigation

[54] On 12 March the final report from Mr Timms and Mr McGregor was emailed to XDC. There were two aspects to the investigation. The findings from a review of the disciplinary investigation were recorded as follows:

- the disciplinary process for refusing a reasonable instruction was robust and all factors were considered prior to making a decision. It is noted that in investigation process, XDC became overtly hostile towards the investigators and was not open to considering all the factors that occurred.
- The written warning was appropriate for refusing a reasonable instruction from a direct manager.
- It is recommended that the written warning for unapproved leave be reviewed and removed from the file.

[55] The instruction on 29 January from Mr Austin for XDC to find cover for the guard was considered to be lawful and reasonable because:

- Travis provided clear and reasonable instruction to XDC in the initial email request. XDC raised concerns about the shift with an interview and meeting scheduled that afternoon. Travis reassigned interview to Joe O'Boyle which was reasonable.
- There have been no veiled threats or threat of language based on our investigation – merely stating facts as it is per complaint received from TPG. Complaint alleged constructive dismissal through the way in which XDC had treated him.
- Travis gave XDC three reasonable instructions before advising that he would be starting an HR process against him. XDC disagrees that this was the case, but it was not bullying.

[56] The report also noted it was part of XDC's regular duties to find suitable cover for shifts and if no cover was available it was reasonable for XDC to cover the shift. XDC acknowledged he had done this before. Because XDC raised concerns about his workload, some duties were reassigned to allow XDC to provide the cover. It was

recorded Mr Austin should not have engaged in email conversation about work after 8.00pm on a work night and noted if that had not occurred a more productive outcome may have been reached.

[57] The findings in relation to the investigation into whether Mr Austin had engaged in bullying behaviour towards XDC was two fold because Mr McGregor had earlier investigated XDC's earlier complaint he was being bullied and referenced the Health and Safety at Work Act 2015 because the Wellington office was an unsafe work environment for XDC. The purpose of the earlier review was to ensure it was safe for XDC to return to the Wellington office after the email exchange on 29 January 2024.

[58] Mr McGregor was provided with the emails between Mr Austin and XDC and his conclusions were:

- The email exchanges between XDC and Mr Austin did not meet the threshold of making a workplace unsafe nor would they reasonably be expected to cause emotional distress.
- The other two Wellington Operations Managers confirmed they have not ever felt bullied or witnessed any behaviour like this from Mr Austin.
- The Wellington office is busy with numerous staff. Managers have separate offices so there is limited opportunity for one on one contact.
- There are no specific clauses with regards to bullying in the Health and Safety at Work Act 2015 but Allied has a primary duty of care to ensure workers are not put at risk by the work that they do.
- Allied office is a safe and secure location for XDC to work in. It would also be safe for XDC to work in the office alongside Mr Austin.

[59] It was also recorded in the 12 March final report the investigation report was reviewed by Ms Sinclair-Hyde, Human Resources Advisor, who provided feedback to Mr Timms and Mr McGregor before it was finalised. It is noted XDC raised concerns about a communication between Mr McGregor and Ms Sinclair-Hyde he says was unprofessional.

[60] The ultimate conclusion was that email exchanges between Mr Austin and XDC did not meet the threshold required for a workplace to be considered to be unsafe and could not reasonably be expected to have caused emotional distress. It was noted Allied Security had a primary duty of care to ensure workers are not put at risk by the work they do but concluded:

Following the investigation, I conclude that the Allied Security office is a safe and secure location for [XDC] to work in. I further conclude that it will be safe to have him working in the office alongside Travis Austin.

[61] There was also a further section in the report entitled “Culture within the Wellington Branch”. It was recorded the two other Wellington managers were happy with the work environment and no one else provided negative feedback about Mr Austin. It was recommended Allied continue to provide support to Mr Austin in developing his leadership and fostering a positive culture.

[62] XDC emailed Mr McDowell on 17 February and raised issues about whether this investigation had been sufficient for the purposes of a bullying investigation and stated the HR process was defective and without consideration of threats to XDC’s position. He also recorded his view it was biased, not impartial and performed in bad faith to “deliberately disadvantage” and devalue XDC professionally and trivialised the negative impact that Mr Austin’s actions had on him personally. A video call to discuss the findings was offered to XDC to discuss the report.

XDC resigns

[63] On 9 April 2024, XDC resigned and recorded his concerns about bullying. XDC had also previously raised two personal grievance claims on 6 and 17 February 2024 that resulted in the investigations set out above. XDC lodged a statement of problem in the Authority on 20 June 2024 recording he was seeking compensatory damages for financial loss caused by having to resign to seek relief from bullying.

Constructive dismissal and disadvantage claims

[64] XDC lists numerous issues arising in the workplace in a narrative style. His claim records among other things that Allied allowed Mr Austin to bully him and use his status to deliberately disadvantage his position. Allied was unwilling to acknowledge or address the issue causing professional harm to XDC’s position. Allied offered no remedy and refused to ensure XDC’s safety because it did not provide an inclusive work environment free of bullying, threats to his position and from being disadvantaged by Mr Austin.

[65] After XDC communicated his intention to resign Allied failed to find a meaningful solution where Mr Austin would be held accountable and XDC could retract his resignation and return to work in a safe environment. XDC says he was

disadvantaged when his employer refused to ensure his safety or provide a workplace free of bullying which drove him to resign to seek relief from bullying.

[66] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign. Although XDC did not refer to constructive dismissal, the Authority has investigated whether XDC was constructively dismissed as well as whether XDC was disadvantaged in his employment by Mr Austin's conduct and Allied's inaction.

[67] The first issue is whether the decisions and actions taken by Allied meant XDC's resignation can be considered to be a constructive dismissal. In order for there to be a constructive dismissal, the employer must have in effect dismissed the employee, although technically the employee resigned. The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* set out three non-exhaustive categories of constructive dismissal:¹

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer leads an employee to resign.

[68] The evidence did not reach the threshold to prove Allied's conduct fell into the first two categories. The threshold for both these categories is high. The third category, the breach of duty by the employer, would require Allied to have committed a sufficiently serious breach of duty at a level of seriousness to have made XDC's resignation reasonably foreseeable.

[69] As XDC points out bullying can be an unjustified disadvantage and/or a (constructive) dismissal under the Act. The correct approach when considering constructive dismissal is to firstly conclude whether the resignation was caused by a breach of duty on the part of the employer and then assess whether the breach of duty by Allied was of sufficient seriousness to make resignation reasonably foreseeable.²

¹ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

XDC has the burden of establishing his resignation was actually a constructive dismissal.

What was the reason for XDC's resignation?

[70] XDC's concerns about TPG were the start of a chain of events ending with XDC's resignation. After TPG resigned Mr Austin became aware a second letter of expectation had been issued to TPG in strong terms. XDC and Mr Austin disagreed from the start about how to manage TPG's conduct and Mr Austin made a unilateral decision to permit TPG to rescind his resignation.

[71] This was the start of the dispute between XDC and Mr Austin that escalated from there to the 29 January email exchange culminating in XDC refusing to follow Mr Austin's instructions. An employment investigation was carried out and found XDC had refused to follow a lawful instruction in the workplace and to come to work the next day.

[72] XDC was issued with two final written warnings although one was later withdrawn after the review. XDC raised several personal grievance claims about Mr Austin's conduct towards him and also complained the conduct amounted to bullying. Allied investigated XDC's bullying complaint. It also reviewed the investigation it had undertaken into XDC's conduct. The warning for working from home without authorisation was withdrawn after the review.

[73] Throughout this period XDC continued to oppose all steps Mr Austin took in relation to TPG and rostering. XDC formed the view Mr Austin was targeting him. His submissions extend to assertions Mr Austin has lied about things they argued about and that every step that was taken was designed to de leverage XDC. The animosity between them spilled over to group chats with the other managers.

[74] XDC also pointed to an email dated 8 March 2024 he says showed Mr Austin continuing to bully XDC by targeting his work performance. This led to another email to Mr McDowall about Mr Austin's treatment of XDC. By this stage the relationship between XDC and Mr Austin was tenuous at best. Mr Austin sent a please explain email in relation to other work matters. XDC did not accept the issues in the email were issues and said Mr Austin was not supporting him. The Alan Timms and Jared McGregor report was released on 12 March 2024 and XDC resigned after that.

[75] XDC says schedule 3 to his individual employment agreement required that a robust neutral timely and effective investigation into bullying would be carried out. In his view what transpired was none of those things. It is clear XDC resigned because of his belief the instruction to cover TPG's shift was not reasonable or lawful and that he disagreed Mr Austin could direct where TPG was placed on the roster. He felt targeted and bullied and as a consequence that the workplace was unsafe for him. This chain of events in these circumstances caused XDC to resign.

Was resignation caused by a breach of duty by Allied Security?

[76] There are a number of duties on employers inherent in the employment relationship. Allied had a duty to deal with XDC in good faith and be active and constructive in maintaining a productive employment relationship. There is also an implied duty on employers to be fair and reasonable. Other implied duties such as the duty not to damage the relationship of confidence and trust between and employer and employee and the duty to provide a safe workplace stem from that overriding duty. In the context of allegations of bullying that cause the workplace to be unsafe, if made out can be considered to be breaches of an employer's duties and obligations and/or to have disadvantaged an employee in their employment.

The issues with TPG

[77] The issues with TPG that XDC experienced, in terms of having a security guard who either did not turn up for rostered shifts and failed to actively resolve issues preventing them from accessing the time recording system and rosters, were issues it was reasonable for a manager such as XDC to address. There was agreement from XDC they were performance issues and not disciplinary. XDC could also see the way in which he approached them was more akin to a disciplinary matter but he maintained they were at the most serious end of the scale of performance issues.

[78] By the time Mr Austin became involved, matters had escalated because TPG had resigned in response to the second letter. The situation Mr Austin was confronted with was a resignation he was concerned about and a manager who protested his actions were reasonable. Mr Austin in the role of regional manager had oversight of the region and all aspects of the situation that included ensuring fairness for both TPG and XDC.

[79] Regardless of the rights and wrongs about how the performance matter was addressed with TPG, Mr Austin was directly involved in identifying and managing the

risks arising from TPG's sudden resignation and taking steps to ensure TPG was treated fairly in his employment at Allied. This included offering TPG a cooling off period and allowing them to rescind their resignation. It also extended to making decisions about where TPG would be placed on the roster and ensuring TPG was rostered in a way that allowed at least his minimum guaranteed hours to be worked.

[80] It was reasonable for a manager in Mr Austin's position, who had oversight of the bigger picture, to ensure steps were put in place to manage the situation with TPG given the types of concerns Mr Austin identified.

There was a conflict of interest with TPG

[81] XDC submits there was no conflict of interest with TPG but this is at odds with how XDC recorded his views of TPG at the time. It is clear from the content of XDC's emails he had a jaundiced view of TPG and it is unlikely that could have been caused by the performance issues alone. I reach this conclusion because XDC had only worked at Allied Security for approximately one month before sending the first expectation letter. Performance issues are not normally at the top end of a scale of serious in terms of conduct in the work place. XDC maintained TPG's performance issues to be very serious and was clear he disagreed with the decision to allow TPG to rescind his resignation.

[82] On an objective assessment it cannot be said TPG's conduct was so serious it was at the top end of the scale seriousness for performance issues. It was clear XDC needed to address the issues but the way XDC chose to address them was out of step with performance management. When I combine those factors with the statements XDC made about TPG in the multiple emails he sent Mr Austin it is clear his views were influenced by something more than the performance concerns. I find XDC's view was coloured by his previous knowledge of TPG and this played out in the way he responded to Mr Austin's attempts to manage the risks for Allied that had arisen.

[83] Given his prior knowledge of TPG and the fact he relied on that in his communications with Mr Austin to support his views about TPG, I find there was a conflict of interest or a bias on the part of XDC towards TPG. I note at this point XDC lodged a letter in the Authority with the intention of demonstrating wrongdoing by TPG prior to XDC starting work at Allied. That letter had been redacted. On review of the full letter, it is clear the redactions altered the overall meaning of the letter. Nothing

turns on that letter but the fact it was amended without transparency or an explanation to the Authority, demonstrates the strength of XDC's views.

Mr Austin's directions about TPG were reasonable

[84] Mr Austin had sent an expectations email to the operations managers on 15 January 2024 reminding them if a member of their staff called in sick, for whatever reason, they were expected to step in and cover the shift. On 29 January 2024, Mr Austin sought to have XDC cover part of TPG's shift and that led to XDC refusing and they argued about that over email until Mr Austin gave a final direct instruction. XDC refused to follow that instruction and communicated his refusal in a very direct manner. That led to the disciplinary investigation and warning XDC received for failing to follow a lawful instruction.

[85] XDC says the instruction was orchestrated to deleverage XDC but there is no evidence of that. The communications between them deteriorated and XDC clearly blamed Mr Austin and the decision to allow TPG to withdraw his resignation. His emails protesting the instruction to cover TPG's shift included telling Mr Austin he needed to "eat this one" and "own this sir like you would have me do". Then in response to Mr Austin telling him it was not up for debate and that he was to cover TPG the next day XDC replied:

No, sir I will not

[86] It was clear XDC did not agree with Mr Austin's decision making. I have found above it was reasonable for Mr Austin to take steps to ensure TPG was treated fairly and there was a conflict of interest that was likely affecting XDC's perspective on matters to do with TPG.

[87] With the benefit of having the emails available what is very clear is that XDC disagreed strongly with Mr Austin's initial decision allowing TPG a cooling off period and the opportunity to withdraw the resignation. While Mr Austin has ended up in a position where he had to act unilaterally, his actions in taking control as the regional manager of the situation with TPG were reasonable. There was a conflict of interest, XDC showed no willingness to reflect on the situation and then blocked each step Mr Austin took. Mr Austin was justified in taking steps to ensure TPG was treated fairly and it was reasonable for him to insist his instructions be carried out at that time.

XDC was not bullied

[88] WorkSafe defines bullying as follows:³

Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.

...

Workplace bullying is not:

- one-off or occasional instances of forgetfulness, rudeness or tactlessness
- setting high performance standards
- constructive feedback and legitimate advice or peer review
- a manager requiring reasonable verbal or written work instructions to be carried out
- warning or disciplining workers in line with the business or undertaking's code of conduct
- reasonable management actions delivered in a reasonable way
- differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.

[89] WorkSafe also recommends employers should deal with all undesirable work behaviours including one-off incidents regardless of whether the behaviour falls under its definition because such behaviours can escalate and should not be ignored.

[90] There is no doubt the communications reached the point they were robust. Neither XDC nor Mr Austin were happy with each other. XDC sought to minimise the tone of his responses to Mr Austin at the investigation meeting saying he regarded some of the terminology as slang. That is not accepted because the escalating emails illustrate XDC's increasing animus towards Mr Austin. They had to resolve the disagreement about the best course of action to cover TPG's shift the next day but XDC's emails quickly became personal and contained XDC's criticisms of Mr Austin's leadership style. Mr Austin on the other hand although he remained firm about his instruction, addressed the work issues. He found solutions for XDC's workload issues and indicated XDC could re prioritise his work, but XDC did not accept that. The result was XDC being informed the matter would be referred to HR.

³ www.worksafe.govt.nz/topic-and-industry/bullying/good-practice-guidelines-preventing-and-responding-to-bullying-at-work/

[91] The complaints about Mr Austin engaging in bullying conduct stem from the various steps he asked be taken in relation to TPG. TPG was a single issue with XDC's reactions to Mr Austin's decision making about how to manage the risks becoming increasingly strident. There was also the overlay of the conflict of interest disclosed by XDC in the midst of these difficult communications and the fact I have found it was reasonable for Allied to be concerned about the letters of expectation which is where the disagreements started.

[92] With these factors present what occurred does not represent an overall pattern of unreasonable conduct and communications by Mr Austin towards XDC or retaliation. There were multiple communications between them over a relatively short period. While XDC claims Mr Austin's actions deleveraged him and undermined him, the confined issue and period of time involved means there is difficulty concluding there was repeated unreasonable behaviour directed at XDC.

[93] In addition, the communications entered into by both XDC and Mr Austin were on a fairly equal footing. Even taking into account the inherent power imbalance between employers and employees recognised in the Act⁴ what is evident is that XDC's communications quickly became personal whereas Mr Austin although firm, continued to keep his communications about work and when it was clear the instruction was not going to be followed, referred the matter for consideration of an employment investigation.

[94] Mr Austin accepted that continuing to email late at night was inappropriate but it is accepted there were some justifications he can rely on given the need to find cover for the next day. XDC also did not respond to the first email sent during work hours, until several hours later. It was not until several emails had been sent that it became evident there was a problem and that it could not be resolved. Mr Austin could not know the depth of XDC's resentment towards him and his decision making until later in the email chain. Emailing late at night on one occasion on its own is unlikely to be considered to be bullying unless other factors are present and in this case I have found they were not.

[95] The internal review of the employment investigation into XDC's refusal to follow a lawful instruction found both the process followed and the conclusion reached

⁴ Employment Relations Act 2000, s 3(a)(ii).

to have been appropriate and that XDC was not bullied by Mr Austin. Allegations were provided to XDC, he was given opportunities to respond both in writing and in person and his responses were taken into account. This was evident in the investigation findings. Although they did not agree that XDC was right, his point of view was recorded in the body of the investigation report, in the conclusions and reasons were provided as to why his view was not accepted.

[96] The first meeting became heated with both sides alleging the other was refusing to allow them to talk. It became clear the meeting reached an impasse at that point and was no longer productive. In the context of an employment investigation, Allied carried on and gave XDC further opportunities to provide feedback and arrangements were made for XDC to work elsewhere in the interim. Mr McGregor was also tasked with reviewing whether the Wellington office was a safe workplace for XDC.

[97] It is evident XDC disagrees with all of the findings and steps Allied took. Noting the finding above that Allied was justified in reaching the conclusion XDC had failed to follow a lawful instruction, and that the communications were robust, the workplace was not unsafe because of bullying. It arose in the context of a significant disagreement between a manager and a direct report about what steps could and should be taken in relation to TPG. In circumstances where the instruction was lawful and XDC's own communications were aggressive and at times inappropriate there are difficulties in concluding Mr Austin's conduct reached the threshold for bullying.

[98] In the circumstances the conclusions reached were open to the investigators and reasonable for Allied to adopt as its position, including finding that XDC was not bullied. The warning in relation to unauthorised working from home was withdrawn which was also a reasonable step to take at that point.

The subsequent emails

[99] XDC also raised further issues about emails from Mr Austin on 8 March. XDC forwarded those to Mr McGregor alleging Mr Austin was disadvantaging him personally in his position.

[100] Mr Austin had sent a blunt email to XDC stating it was no longer acceptable to roster staff into sites when they had not been through the induction or trained. Mr Austin asked XDC to explain why the five employees he listed had not had their induction training or were not recorded as having received training. XDC responded

saying he would get to it later but that none of it was correct. Mr Austin was also concerned about an employee exceeding 65 hours in a week which he had not approved. XDC's response included telling Mr Austin he was disengaged, he had already been told by XDC he was short on staff, and that staffing situation was why an employee had worked over 65 hours.

[101] On balance I reach the same conclusion in relation to this chain of emails as the ones about TPG. While Mr Austin's approach was blunt he is entitled as a manager to ask for an explanation from a direct report about operational matters. Employees working over 65 hours per week and not having their induction training are matters which a regional manager could be justified in having significant concerns about because both raise issues about compliance with employment standards. By this stage, the relationship was tenuous but XDC's responses show a willingness to engage in communications with his manager that were as blunt as Mr Austin's but also in addition, personal and critical of Mr Austin's management style, character and demeanour and did not accept Mr Austin could make operational decisions in the interests of the business.

[102] This is not a situation where Mr Austin can be said to be seeking ways to show XDC was incompetent as alleged by XDC. Managerial prerogative will allow at times for managers to ask for explanations with an expectation it will be provided. While employees can be unhappy about how their managers addressed matters in the workplace and also be generally unhappy within their workplace and resign as a result, that does not necessarily mean the resignation amounts to a constructive dismissal. This is such a case. The conduct in issue does not reach the level where it can be said Allied was in breach of the duty of good faith or fair dealing.

[103] XDC was not constructively dismissed.

Was XDC disadvantaged?

[104] Although I have found XDC was not constructively dismissed by Allied, I have considered whether any of Allied Security's actions leading up to XDC's resignation nonetheless amounted to an unjustifiable disadvantage.

[105] There are three issues XDC raises that may have disadvantaged him. He says when his bullying complaint was being investigated, the Wellington office were told he had made the complaint. He intended his complaint to be confidential. However,

Mr McGregor denied that he had revealed XDC's identity to the other operations managers who were interviewed and I accept that evidence. If others knew, and no evidence was produced to show they were, it is likely given the small number of managers and the strained communications between Mr Austin and XDC, that others had formed a view about why they were being asked about the culture in the office.

[106] The second issue is that TPG formalised a complaint about XDC that was not investigated. Mr Austin did not immediately act on that complaint and XDC was not made aware of it until a later date. XDC takes issue with the fact it was forwarded to Mr McDowall the day before the investigation meeting with XDC.

[107] Ms Sinclair-Hyde's evidence was that TPG's complaint was put aside until the other investigations had been completed but events were overtaken by XDC's resignation. That is a step open to a fair and reasonable employer in the circumstances. There are complexities in dealing with complaints and counter complaints that relate to more than one employee in the workplace. The standard against which an employer is judged is tied to the circumstances at the time. In the circumstances of two investigations plus a reviews of those investigations after bullying was alleged, it was reasonable for Allied to put TPG's complaint aside until the other investigations were completed.

[108] What could not be reasonable would be if TPG's complaint was available to investigators or decision makers when XDC had not had an opportunity to respond to it. It does appear that TPG's complaint was referred to in the investigation report but in a limited way. It is recorded as Mr Austin merely stating the facts "as per the complaint from TPG". Because this relates to Mr Austin and XDC's emails on 29 January, Mr Austin did notify XDC of the complaint during that email conversation.

[109] Mr Mc Dowall's receipt of TPG's complaint is not unreasonable. He likely had oversight of the big picture which is also not a situation that could be avoided. Mr Austin reported to him and would have been remiss had he not reported risk to his manager. Mr McDowall was not the investigator but he did have oversight. However, he was guided by the outcome of the investigations and the findings were adopted by Allied and they were not unreasonable findings for Allied to have reached.

[110] In those circumstances XDC was not disadvantaged by TPG's complaint not being investigated until after the other investigations were complete.

[111] The last issue is the email between HR and Mr McGregor that although was not known to XDC at the time, he came to know about it in the course of this proceeding. He says it shows unprofessional behaviour and reflects on the investigation findings. The email does have an appearance of Mr McGregor not taking XDC's complaints seriously but it is in the context of engaging with Ms Sinclair-Hyde about her review of the investigation report. The email lacked courtesy and bordered on unprofessional conduct but XDC was not aware of it at the time. Given I have found the investigation conclusions that Mr McGregor was involved in were open to a fair and reasonable employer, no disadvantage to XDC arises from it.

Non-publication

[112] Submissions were called for in relation to non-publication. An order for permanent non-publication is a departure from the fundamental principle of open justice. The standard for departure is a high one but the risk of harm to an individual has been accepted as a sound reason to displace the presumption of open justice.

[113] The Court recently considered the test for granting non-publication orders in *MW v Spiga Limited*⁵ and confirmed the fundamental importance of the established general rule of open justice unless there are sound reasons for departing from that rule. There must first be a reason to believe specific adverse consequences could "reasonably be expected to occur" and secondly the Authority must undertake a weighing exercise and consider whether those adverse consequences justify a departure from open justice in the circumstances of the case.

[114] Public disclosure of XDC's name could lead to the identity of other members of his family who are not involved in the employment relationship dispute and it is likely to cause harm that can be specified should they be identified, with particular emphasis on the age and stage of some of the affected family members. Any potential harm in these circumstances would be disproportionate to any legitimate public interest in knowing XDC's identity.

[115] It was also necessary to include contextual information about TPG but TPG did not give evidence. The public interest does not outweigh the associated privacy interests of TPG in the context of public reporting to resolve another person's

⁵ *MW v Spiga Limited* [2024] NZEmpC 147.

employment dispute. I consider the presumption of open justice is outweighed in relation to the publication of information that would identify both XDC and TPG.

[116] Under clause 10 of schedule 2 of the Act non-publication orders are made in relation to names and identifying information of the applicant (XDC) and another employer (TPG).

Costs

[117] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[118] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Allied Investments Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum XDC will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[119] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies